SUPREME COURT, U. S.

SEP 28 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

NO. 636

DOROTHY B. McCREA, ET AL,

Petitioners,

v.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the petition for Writ of Certiorari be denied for the reason that the District Court and Court of Appeals for the Fifth Circuit have accurately and correctly decided this controversy.

CITATIONS TO OPINION BELOW

The opinions of the District Court and Court of Appeals correctly state the facts and the law applicable to this controversy.

QUESTIONS PRESENTED FOR REVIEW

The only real question in this controversy is whether the Harris County Houston Ship Channel Navigation District is a common carrier by railroad within the meaning of 45 U.S.C. § 51.

STATUTES INVOLVED

That portion of Petitioners' application appearing under the heading "Constitutional Provisions Involved" is misleading in that 49 U.S.C. § 1 (3) (A) is not involved in this case. This case involves 45 U.S.C. § 51. The definition contained in 49 U.S.C. § 1 (3) (A) has no relevance whatsoever to this cause and has never been relied upon by any Court to determine whether or not an entity is a common carrier by railroad within the meaning of 45 U.S.C. § 51.

The purposes of 45 U.S.C. § 51 and 49 U.S.C. § 1 (3) (A) are totally different and the decisions of the Courts in the refrigerator car cases, pullman car cases, freight forwarding cases and railway express cases would have been totally and entirely different had the definition contained in 49 U.S.C. § 1 (3) (A) been applicable to the Federal Employers Liability Act.

FACTS AND AUTHORITIES SHOWING THE NAVIGATION DISTRICT IS NOT A COMMON CARRIER BY RAILROAD WITHIN THE MEANING OF FEDERAL EMPLOYERS LIABILITY ACTS, 45 U.S.C. § 51.

The basic and controlling facts are accurately stated in the opinions of the District Court and the Court of Appeals. This portion of the reply will simply attempt to highlight certain inaccuracies appearing on pages six through seventeen of the Petition for Writ of Certiorari.

1. The Petition Overlooks the Principal Thrust of the opinions of the District Court and the Court of Appeals.

The principal thrust of these opinions is that in the ordinary acceptation of the word "railroad", the Navigation District is not a common carrier by railroad.

The Navigation District does not own or use locomotives or cars (R. 187), has no train schedules, issues no railroad tariffs or bills of lading (R. 203), operates no trains (R. 144), employs no firemen, switchmen or engineers or others having the usual classifications as railroad employees (R. 187), maintains no tracks or roadbed except for industrial sidetracks used in loading and unloading operations in the vicinity of the grain elevator and bulk materials handling plant (R. 144), does not in any manner hold itself out to the community as furnishing rail service (R. 103), and in fact furnishes no rail service. *Wells Fargo v. Taylor*, 254 U.S. 175 (quoted verbatim on p. 3 of the trial court's opinion) makes this apparent, surface-view important. The basic teaching of this early opinion, and the holding of the District Court and the Court of Appeals, in the case at bar, are basically to the effect that a "common carrier by railroad" is a "going railroad" with cars, engines, engineers, firemen, switchmen and trains.

Through the years, Labor Unions, Social Security Administrators, Federal Wage & Hour Administrators, the National Labor Relations Board, Railroad Retirement Act officials and others in the community generally have acted on the assumption that the Navigation District was not a "common carrier by railroad". The Navigation District does not withhold funds and contribute to the Railroad Retirement Board Fund, but on the contrary withholds Social Security payments and remits these to the Social Security Administrator. (R. 184). "Going railroads" remit withholdings to the Railroad Retirement Board and are not subject to social security. (R. 476, 257). The Navigation District, because it is an instrumentality in the State of Texas, has no labor union contract but has for many years withheld amounts from its employees and made voluntary payments on behalf of its employees to the International

Longshoremens Association Maritime Union and Vacation Fund (R. 258). The Navigation District has established for its employees a comprehensive series of benefits predicated on the assumption that the Navigation District is not a common carrier by railroad subject to the Railroad Retirement Act, but is an employer subject to the terms and provisions of the Social Security Act. (R. 184, 185).

In its fifty-five years of existence no one other than Mrs. McCrea and her lawyer have ever contended in a damage suit that the Navigation District was a common carrier by railroad. (R. 64).

The attitude of the community as a whole and the detailed complex arrangements made by the Navigation District with reference to the welfare and retirement — sickness plans of its employees should not affect a judgment of the Court if in fact the Navigation District is a common carrier by railroad; however, these long-standing practices, attitudes and methods of operations are relevant to determine whether, within the "ordinary acceptation of the words", the Navigation District is a "going railroad" or a "common carrier by railroad".

2. It is Inaccurate to State, as Petitioner Does, That the Opinions of the District Court and the Court of Appeals are Contrary to *Union Stockyard & Transit Company of Chicago* v. *The United States*, 308 U.S. 213 (1939), *Union Pacific Railroad Company* v. *F. H. Peavey & Company*, 32 S. Ct. 22 (1911), *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), *Galveston Wharf Company, et al* v. *Galveston, Harrisburg & San Antonio Railway Company, et al*, 285 U.S. 127 (1932), *United States* v. *California*, 297 U.S. 175 (1936), *United States* v. *Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919) and *Lone Star Steel Company* v. *McGee*, 380 F. 2d 640 (Fifth

Cir.), Cert. Den'd. 389 U.S. 977 (1967) because in each of these cited cases the entity held to be a common carrier railroad did in fact perform a rail service.

Navigation District, under the undisputed evidence, performs no rail service.

Petitioners' basic argument is predicated on a faulty premise, to-wit: that the movement of rail cars of grain pursuant to unloading them is a rail service. The applicable authorities and the undisputed facts here reveal that the unloading of carload lots of intangible freight, such as grain shipped in to the grain elevator and the bulk freight shipped to the bulk materials handling plant, is not a "rail service" but is a non-railroad task which must be performed by the shipper or consignee. (R. 187, 191-192, 196, 197). A railroad cannot legally unload carload lots of inanimate freight or move cars in switching operations incident to such unloading without making a separate charge for such service in addition to the "line haul" rate. Performance of such service, without charge, would constitute an illegal rebate. (See authorities discussed *infra*).

Rail transportation of carload lots of inanimate freight ceases from an operational and from a legal standpoint when delivery is made upon the side track adjacent to the unloading facilty or adjacent to the plant to which the inanimate freight is consigned. (See authorities discussed *infra* and R. 191-197, 205, 496).

A shipper, by virtue of paying the line haul rate, is not entitled to have the rail carrier bring his carload of grain to the Navigation District's elevator, wait until the car may be placed upon the dumping platform and then push the car under the platform. The only service which the grain shipper may legally or customarily receive by virtue of pay-

ment of the line haul rate is delivery to the tracks adjacent to the grain elevator. When the carload of grain is delivered to the tracks adjacent to the grain elevator, delivery is accomplished, the obligations of the bill of lading are discharged, and the Navigation District assumes responsibility for the grain. (R. 191-197, 205, 496). A shipper must make a separate agreement with the Navigation District to elevate his grain and pay the Navigation District a specific fee for the act of elevating the grain. (R. 240). No separate charge is made and no separate fee is paid for the work of pushing or pulling the carload of grain on to the grain dumper. (R. 203, 263).

Stating the well established, universally accepted rule, Justice Frankfurter in *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954) said:

> "The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee. Normally unloading is not a part of the delivery and is performed by the Consignee. . . . In the case of private sidings, the railroad's 'job ends' when it has placed the car on the Consignee's siding."

Petitioners' efforts to rely upon *Union Stockyard & Transit Company of Chicago* v. *United States*, 308 U.S. 213 (1939) and *United States* v. *Sioux City Stockyards Company*, 162 F. 556 (Ohio 1908) is misleading because the unloading of livestock, as contrasted to inanimate carload lots, is a rail service. The difference in the rules applicable to livestock is easily illustrated:

> ". . . The shipper or consignee has the duty to load and unload freight shipped in carload lots, or where for the shipper's convenience the car is to be loaded or unloaded or placed at his warehouse or on public tracks." 13 Am. Jur. 2d Carrier § 319, p. 814.

With reference to livestock, however, a different rule applies:

> "In the absence of an understanding or agreement to the contrary, a carrier has the primary duty to load and unload livestock, . . ." 13 Am. Jur. 2d Carriers, § 321, p. 816.

Union Pacific Railroad Company v. *F. H. Peavey & Company*, 32 S. Ct. 22 (1911) is distinguishable from the case at bar on the same grounds as the other cases discussed under this heading. The elevation of grain in that case was not truly an unloading operation but was elevation incident to and part of the rail transportation. The elevation was covered by the line haul rate and was necessary only because the railroad chose to transfer grain from smaller railroad cars to larger railroad cars in connection with a rail movement from western Kansas to New York. The shipper, in the Peavey fact situation, did not even know or need to know that the elevation occurred, did not pay for the elevation and the elevation occurred long before a delivery had been effected.

Petitioners' reliance upon *Lone Star Steel Company* v. *McGee*, 380 F. 2d 640 (Civ. App. 5th Cir. 1967) is likewise inapposite for the reason that Lone Star Steel Company in the *McGee* case obviously was performing a rail service. That case is not applicable to the case at bar for all of the reasons outlined in the District Court and Court of Appeals opinions.

3. It is Totally Inaccurate to State, as Petitioner Does on Page Sixteen of His Petition, That ". . . the Navigation District is in Truth and in Fact the 'Alter Ego' of the PTRA" because the PTRA is a separate and independent entity, Totally Independent of Navigation District Control and Domination.

The PTRA is a voluntary, unincorporated association formed in June, 1924 for the purpose of furnishing "impartial, efficient, unified and economical switching service by an independent and neutral organization, separate and distinct from the organizations of, but for the benefit of, the parties hereto, to serve the public on wharves, docks, elevators or other water terminal facilities and publicly owned railroad facilities now existing or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel . . . to thereby afford every railroad entering the City of Houston access thereto without discrimination so far as may be." (See p. 2 of agreement establishing PTRA.)

It is not factually accurate to state, as petitioner does on page seven of his petition that "the overall management of the PTRA is vested in its Board of Control, composed of five Navigation District commissioners and one executive from each of the six member railroads". On the contrary, the record is undisputed that the actual administration and control of the PTRA rests in a Railway Executive Committee composed of the executives from each of the railroad members of the PTRA. (R. 113, 174). The Railway Executive Committee, composed entirely of railroad employees, sets the policies and conducts all the operations of the PTRA. (R. 113). This Executive Committee, having no connection whatsoever with the Navigation District, employs and supervises the officials of the PTRA (R. 175), determines its operating policies, determines the compensation of the officials of the PTRA, schedules the movement of trains and arranges for the furnishing of locomotives and other movable rail equipment. (R. 113-116). The Navigation District has no control over the identity of the managing personnel of the PTRA, (R. 119, 176), has no voice in the compensation paid to the managers or the employees of the PTRA (R. 115), exercises no supervisory control

over either the managers or the employees of the PTRA, has no authority concerning operating decisions or the scheduling of trains on the PTRA. (R. 114-115).

Navigation District employees do not attend and have never attended the meetings of the Railroad Executive Committee. (R. 113). Navigation District is not normally advised of the activities, meetings and decisions of the Railroad Executive Committee. (R. 175). Navigation District officials do not even know the identity of the members of the Railroad Executive Committee. (R. 113). The two entities have separate employees and no common employees. (R. 45).

Navigation District does of course own the right-of-way and the tracks upon which the PTRA operates, but PTRA performs the actual maintenance work on the tracks. None of the employees of PTRA, including the maintenance employees, are supervised in any degree by Navigation District personnel. (R. 116).

The so called "Board of Control" of the PTRA is a figurehead body which meets less than once a year. (R. 109).

By the terms of the agreement covering the PTRA, all decisions of the so called "Board of Control" are made with the railroad members having five votes and the Navigation District only two votes, with the exception of decisions pertaining to capital improvements. (R. 79). The Navigation District's only power over the PTRA would be to refuse a request for a capital improvement. If such a refusal occurred, the member railroads could make any capital improvement themselves which they wished to finance. (R. 79, agreement establishing PTRA, and R. 470-473).

Petitioners' assertion that the so called "Board of Control" is in charge of the overall management of the PTRA

is inconsistent with the facts and inconsistent with the uncontradicted record to the effect that the so called "Board of Control" has never done anything, except to meet at irregular, widely spaced intervals. (R. 109). The voting arrangement on the Board of Control, wherein all voting power on matters relating to operation and maintenance is vested in the railroad members, and the functioning nature of the Railroad Executive Committee, makes it completely apparent that the Board of Control performs no real function and thus has no need of regular meetings.

The independence of PTRA establishes the inapplicability of cases such as *Galveston Wharf Company* v. *Galveston, Harrisburg & San Antonio Railway Company*, 285 U.S. 127 (1932) and *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), where the crucial fact in both of the Galveston cases was a railroad's actual control, domination and performance of the port function.

Petitioners cite no cases to support the position that the ownership of property used in a railroad busines makes the owner a railroad. As pointed out in the opinions, all the authorities hold contrary to petitioners' position.

CONCLUSION AND PRAYER

Respondent prays that the petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing has been forwarded to Mr. Warner F. Brock, The Main Building, Houston, Texas 77002 on this the 25th day of September, 1970.

Finis E. Cowan